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No. 88-1044

IN THE

Supreme Court Of The United States

October Term, 1988

ASSOCIATION OF SEAT LIFT MANUFACTURERS, *ET AL.*,

Petitioners,

v.

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, *ET AL.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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The Memorandum for the Federal Respondents in Opposition (hereinafter, "Mem.") relies on only a single substantive argument in opposing Petitioners'[1] request that this Court grant the Petition to consider whether jurisdiction exists in the instant case. Respondents do not dispute, as indeed they cannot, that this Court in *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986), established a straightforward jurisdictional test—challenges to the methodology of Medicare Part B benefit determinations are cognizable, while challenges to the amounts of Part B benefit determinations are not. Respondents argue instead that

[1] Petitioner Association of Seat Lift Manufacturers is an unincorporated association. Petitioner Halsom Home Care, Inc. has no parent companies, subsidiaries or affiliates.

this Court in *Michigan Academy* did not establish the liberal jurisdictional test advanced by Petitioners, but merely "carved out" a very limited exception to the implied preclusion wrought by 42 U.S.C. § 1395ff. Respondents argue that *only* facial challenges to a statute or regulation embodying a Part B benefit determination methodology properly should be considered challenges to the "methodology of a Part B benefit determination" for which this Court found no congressional intent to preclude jurisdiction.

1. According to Respondents, challenges to a carrier's interpretation and application of Part B benefit determination methodology regulations, contrary to the plain meaning of this Court's *Michigan Academy* language, are not properly categorized as challenges to the "methodology of a Part B benefit determination." Respondents' suggested interpretation of *Michigan Academy*, however, is not only at odds with how this Court used the word "methodology," but flies in the face of the legislative purpose underlying Section 1395ff as well. By focusing exclusively on an illusory jurisdictional distinction between a methodology as set forth in a statute and a methodology as applied, Respondents distort the intent of Congress reflected in the legislative history exhaustively reviewed by this Court in *Michigan Academy.* The legislative history reflects absolutely no congressional concern with whether an action would be brought to challenge a benefit determination methodology regulation *facially,* as opposed to *as applied.* The jurisdictional distinction that motivated Congress and was articulated as this Court's rationale underlying the *Michigan Academy* jurisdictional test, rather, is between generalized, programmatic challenges to benefit determination methodologies on the one hand, and challenges to specific, individual benefit amount determinations on the other. Congress was concerned as a matter of judicial economy with not burdening the federal courts with reviewing specific, individual benefit amount determinations because they typically involve relatively small sums and require time-consuming, individualized fact-finding. Congress concluded that limited judicial resources would be better expended elsewhere. *Id.* at 675-678.

Petitioners' challenge was filed prospectively, *i.e.*, before the particular reasonable charge methodology at issue even became effective; no specific claims or benefit amount determinations are at issue. The instant case is a programmatic challenge to a generally-applicable benefit determination methodology, which has governed *all* claims filed within the carrier's jurisdiction after the effective date. The exercise of jurisdiction over the instant challenge would be consistent with the limited goal Congress sought to effectuate in the implied jurisdictional preclusion of Section 1395ff – scarce federal judicial resources would be allocated to determining questions of broad, programmatic applicability, rather than being consumed in specific, individualized fact-finding.[2]

The jurisdictional distinction advanced by Respondents between facial challenges to a Part B benefit determination methodology regulation on the one hand, and challenges to the same regulation as applied on the other, thus, is without basis in either the legislative history or this Court's interpretation of it in *Michigan Academy*,

2. That the instant challenge was brought prospectively and does not implicate actual, individual claims serves, moreover, to distinguish the instant Petition from the petition for writ of certiorari in *Kuritzky v. Blue Shield of Western New York, Inc.*, No. 88-685, cited by Respondents, (Mem. at 4), and recently denied by

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[2] That federal court jurisdiction over prospective challenges to a Part B benefit determination methodology as applied would be consistent with this congressional purpose was explicitly recognized by this Court in *Michigan Academy:*

> Unlike the *determinations* of amounts of benefits [in specific cases], the *method* by which such amounts are determined ordinarily affects vast sums of money and thus differs qualitatively from the "quite minor matters" [raised by individual benefit amount determinations] review of which Congress confined to hearings by carriers . . . [and] would not result in a costly flood of litigation, because the validity of a standard can be readily established, . . . even in a single case. [citation omitted]

Michigan Academy at 680-681, n. 11.

this Court. The *Kuritzky* petition, as Respondents correctly point out, also raised the issue of whether jurisdiction exists over challenges to a Part B benefit determination regulation methodology as applied, rather than merely facially. The *Kuritzky* case, however unlike the instant one, arose in the context of specific assigned claims for reimbursement made by Doctor Kuritzky and for which Doctor Kuritzky, unlike the instant Petitioners, was able to, and in fact did, obtain a carrier fair hearing.[3] Thus, while the *Kuritzky* case implicated precisely the specific, individualized fact-finding that Congress expressly sought to spare the federal judiciary, the instant case does not.

3. Respondents also attempt to minimize the conflict between the circuits set forth in the Petition in two ways. First, Respondents ignore the welter of confusing and inconsistent interpretations of this Court's *Michigan Academy* jurisdictional test by the district courts. Although this Court traditionally grants a petition for writ of certiorari to address conflicts amongst the circuits, this Court has granted petitions in part to address conflicts amongst the lower federal judiciary as well. *See United States v. Whiting Pools*, 462 U.S. 198, 202 (1983) ("The Court of Appeals acknowledged that its ruling was contrary to that reached by the United States Court of Appeals for the Fourth Circuit [citation omitted] and noted confusion on the issue *among bankruptcy and district courts* . . . We granted certiorari to resolve this conflict in an important area of the law . . . " [emphasis added]); *North Haven Board of Education v. Bell*, 456 US. 512, 519-520 (1982) (Noting that "[f]our Courts of Appeals *and several District Courts*" were in conflict with the decision below, this Court "granted certiorari to resolve the conflict." [emphasis added]); *Calhoon v. Harvey*, 379

[3] The Respondents' own characterization of the *Kuritzky* petition, moreover, reflects this factual distinction from the instant Petition:

> methods that are reviewable under *Michigan Academy* are the methods the secretary prescribes for implementing the Medicare act, not the methods used by the carrier in applying the Secretary's guidelines *to individual claims for reimbursement.* [emphasis added]

(*Kuritzky v. Blue Shield of Western New York, Inc.*, No. 88-685, Memorandum for the Federal Respondents in Opposition at 4.)

U.S. 134, 137 (1964) ("Because of the importance of the questions presented and conflicting views in the courts of appeals *and the district courts*, we granted certiorari." [emphasis added]); *United States v. Behrens*, 375 U.S. 162, 164 (1963) ("Because of the disagreement between the two appellate courts' interpretation... *and the general confusion in District Courts* and Courts of Appeals as to this section's exact meaning and effect, we granted certiorari ..." [emphasis added]).

The Respondents also try to minimize the disagreement amongst the circuits by attempting to distinguish the conflicting decision of the First Circuit in *McCuin v. Secretary of Health and Human Services*, 817 F.2d 161 (1st Cir. 1987). Although Respondents admit that "the decision in *McCuin* is in some tension with the principle that jurisdiction is not available over administrative decisions involving application of the Secretary's regulations...", (Mem. at 5), Respondents attempt to distinguish *McCuin* on the grounds that it involved a constitutional challenge to Medicare regulations as applied, while the instant case does not allege a similar constitutional violation. The plaintiff in *McCuin*, however, challenged the administrative action on both constitutional *and regulatory* grounds. Because the First Circuit found jurisdiction over both causes of action, the distinction suggested by Respondents is wholly without significance. This Court, moreover, has not predicated jurisdiction on the constitutional nature of a challenge to a Part B benefit determination methodology, noting in affirming *Michigan Academy* that:

> [b]ecause [the District Court] ruled in favor of respondents on statutory grounds, the District Court did not reach their constitutional claims...[and that] [l]ike the District Court, [the Sixth Circuit] too declined to reach respondents' constitutional claims.

Michigan Academy at 669.

Respectfully submitted,

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